Florida Law Review

Volume 2 | Issue 1 Article 8

January 1949

Comparative Negligence: Liability of Railroad Companies

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III. Conclusion

In view of the apparent confusion and the inability of the widow to object to the computation of dower, the next move should be statutory clarification by the Legislature. If the Legislature desires to retain the scheme of priority in payment and distribution set forth in the statutes, it is suggested that dower be specifically expressed as taken from the estate prior to and absolutely free from all debts of the decedent, family allowance, and costs, charges and expenses of administration.

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COMPARATIVE NEGLIGENCE: LIABILITY OF RAILROAD COMPANIES

Florida Statutes §§768.05, 768.06 (1941)

I. History

At common law, contributory negligence is a complete defense in an action to recover for injuries negligently inflicted.[1] In the main, this doctrine applies in Florida today. The ratio decidendi of the courts stems from the aspect of public policy requiring everyone to take reasonable care of his person and property. Despite the laudable purpose underlying contributory negligence as a defense, it early became apparent that the doctrine did not always have a salutary effect. Many jurisdictions have enacted statutes abrogating the common-law doctrine of contributory negligence in certain cases and substituting a statutory rule of comparative negligence.[2] The application of these statutes is usually limited to specialized fields of activity such as railroad-crossing injury cases[3] and workmen's compensation cases,[4] although a few states have

[1]Florida Southern Ry. v. Hirst, 30 Fla. 1, 11 So. 506 (1892); 1 Shearman and Redfield on Negligence §78 (1941).

[2]See Note, 114 A. L. R. 830 (1938). England has recently shifted completely to the admiralty doctrine of contributory negligence in the Law Reform (Contributory Negligence) Act of 1945, 889 Geo. VI, c. 28.

[3]Mass. Gen. Laws c. 160, §232 (1921); Va. Code Ann. §3959 (1930).

[4]Kan. Gen. Stat. Ann. §8481 (McIntosh, 1915).

enacted more comprehensive statutes.[5]

The inequalities present in railroad accident cases precipitated, in Florida, a compelling dictum from Chief Justice McWhorter in *Louisville & Nashville Ry. v. Yniestra*,[6] wherein he decried the lack of any rule that would aid an only slightly negligent plaintiff in recovering from a railroad. Presumably railroads were singled out for special treatment because of their size, danger, and public nature as compared with the horse and buggy. Liability of railroads for damage done to persons or property while operating trains is still predicated on the substantial dangers incident to that type of operation.[7] The suggestion of the Chief Justice was acted upon in the next session of the Legislature, and the resultant enactment[8] was the predecessor of the present comparative negligence statutes. These statutes were adapted from the statutes of the State of Georgia.[9] Furthermore, any known and settled constructions of the Georgia courts not inconsistent with the Florida legislation on the subject were adopted.[10]

II. Constitutionality and Construction of the Florida Statutes

The statute governing the liability of a railroad[11] and the succeeding statute relating to comparative negligence[12] are *in pari materia* and should be construed together.[13] Both statutes have been strictly limited: the former applies to railroads only,[14] and the latter has been held inapplicable in an action for death resulting from a collision between automobile and motor-bus.[15] The constitutionality of the first statute,

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[5]Miss. Code Ann. §511; Mole and Wilson, *A Study of Comparative Negligence*, 17 Corn. L. Q. 333, 604 (1932).

[6]21 Fla. 700 (1886).

[7]Grace v. Geneva Lumber Co., 71 Fla. 31, 70 So. 774 (1916).

[8]Fla. Acts 1877, c. 3744, superseded by Fla. Acts 1891, c. 4071.

[9]Ga. Code §§3034, 3036 (1873).

[10]Florida Cent. & P. R. R. v. Mooney, 40 Fla. 17, 24 So. 148 (1898); Duval v. Hunt, 34 Fla. 85, 15 So. 876 (1894).

[11]Fla. Stat. §768.05 (1941).

[12]Fla. Stat. §768.06 (1941).

[13]Atlantic C. L. R. R. v. Webb, 112 Fla. 449, 150 So. 741 (1933).

[14]Luster v. Geneva Mill Co., 102 Fla. 350, 135 So. 854 (1931); Fruit Grower's Express Co. v. Norton, 95 Fla. 429, 116 So. 234 (1928); Arnold Lumber Co. v. Carter, 91 Fla. 548, 108 So. 815 (1926).

[15]Florida Motor Lines v. Ward, 102 Fla. 1105, 137 So. 163 (1931).

the latter portion of which reads, ". . . the presumption in all cases being against the company," has been thoroughly tested. Unlike the Georgia statute from which it was taken verbatim,[16] the Florida statute has repeatedly been declared constitutional.[17] The Georgia statute, however, was struck down as being a violation of due process under the Federal Constitution.[18] The difference in the statutes lies in their interpretation. The Georgia courts gave their statutory presumption the effect of evidence, holding it a part thereof to be weighed by the jury along with other evidence.[19] In *Western and Atlantic Ry. v. Henderson*,[20] the United States Supreme Court held that "Legislative fiat may not take the place of fact in issues involving life, liberty, or property." The Florida courts, on the other hand, have consistently given a uniform and entirely different interpretation to the presumption of our statutes.[21] The Florida Supreme Court, after setting out the canon of statutory construction that militates in favor of a constitutional interpretation,[22] points out that the only effect of the statutory presumption is to cast upon the railroad the duty of showing affirmatively that its agents have exercised all ordinary and reasonable care and diligence; the presumption is not an integral part of the evidence but merely shifts to the railroad the burden of going forward.[23] The interpretation comes well within constitutional due process[24] and has the same effect as the Mississippi statute,[25] also upheld by the United States Supreme Court.[26]

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[16]GA. CODE §§3034, 3036 (1873).

[17]Atlantic C. L. R. R. v. Voss, 136 Fla. 32, 186 So. 199 (1939); Kirch v. Atlantic C. L. R. R., 38 F.2d 963 (C. C. A. 5th 1930); *see* Stringfellow v. Atlantic C. L. R. R., 290 U. S. 322 (1933).

[18]Western & A. R. R. v. Henderson, 279 U. S. 639 (1929).

[19]Western & A. R. R. v. Thompson, 38 Ga. App. 599, 144 S. E. 831 (1928); Western & A. R. R. v. Dobbs, 36 Ga. App. 516, 137 S. E. 407 (1927).

[20]279 U. S. 639 (1929).

[21]Atlantic C. L. R. R. v. Voss, 136 Fla. 32, 186 So. 199 (1939); Atlantic C. L. R. R. v. Richardson, 117 Fla. 10, 157 So. 17 (1934); Seaboard A. L. Ry. v. Myrick, 91 Fla. 918, 109 So. 193 (1926).

[22]United States v. Standard Brewing, Inc., 251 U. S. 210 (1920); United States v. Jin Fuey Moy, 241 U. S. 394 (1916); 3 SUTHERLAND, STATUTORY CONSTRUCTION §5904 (3d ed. 1943).

[23]Seaboard A. L. Ry. v. Watson, 103 Fla. 477, 137 So. 719 (1931).

[24]U. S. CONST. Amend. XIV, §1; FLA. CONST., Decl. of Rights §12.

[25]MISS. CODE §1985 (1906).

[26]Mobile J. & K. R. R. v. Turnipseed, 219 U. S. 35 (1910).

Nor is the statutory presumption a violation of equal protection of the laws[27] because not applicable to other common carriers.[28]

III. Proof of Negligence

Ordinary and reasonable care is said to be capable of no hard and fast meaning but is dependent upon the circumstances of the individual case.[29] Negligence has been defined by the Florida Supreme Court as "failure to observe for the protection of another's interest, such care, protection and vigilance as the circumstances justly demand and the want of which causes him injury."[30] Under Florida Statutes §768.05 (1941), when the plaintiff has shown that the injury to the person or property was caused by the operation of a train, the presumption of fact arises that the railroad was negligent in the operation of its train. It then becomes necessary for the railroad, in order to escape liability, to go forward with evidence tending to show due care.[31] If any material evidence is offered by the company, the presumption vanishes and is no longer of any weight.[32] This affirmative showing may also be made by examination of the plaintiff's witnesses.[33] The reason for the presumption is that the person most nearly in a position to know the facts should bear the burden of showing them affirmatively.[34] If, after the railroad has introduced some evidence tending to show due care on its part, the trial judge instructs the jury as to the presumption, it is reversible error.[35] It is also settled that mere proof of negligence on the part of the railroad is not in itself sufficient to support recovery; the fact that such negligence was the proximate cause of the injury must also be proved.[36]

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[27]Fla. Const., Decl. of Rights §1.

[28]Seaboard A. L. Ry. v. Watson, 103 Fla. 477, 137 So. 719 (1931).

[29]Atlantic C. L. R. R. v. Watkins, 97 Fla. 350, 121 So. 95 (1929).

[30]Jacksonville Street Ry. v. Chappell, 21 Fla. 175 (1885).

[31]Powell v. Etter, 151 Fla. 866, 10 So.2d 441 (1942).

[32]Florida E. C. Ry. v. Davis, 96 Fla. 171, 117 So. 842 (1928); Seaboard A. L. Ry. v. Myrick, 91 Fla. 918, 109 So. 193 (1926); Seaboard A. L. Ry. v. Thompson, 57 Fla. 155, 48 So. 750 (1909).

[33]Atlantic C. L. R. R. v. Webb, 112 Fla. 449, 150 So. 741 (1933).

[34]Powell v. American Sumatra Tobacco Co., 154 Fla. 227, 17 So.2d 391 (1944).

[35]Powell v. American Sumatra Tobacco Co., 154 Fla. 227, 17 So.2d 391 (1944); Loftin v. Skelton, 152 Fla. 437, 12 So.2d 175 (1943); *cf.* Atlantic C. L. R. R. v. Voss, 136 Fla. 32, 186 So. 199 (1939) (trial court improperly charged jury and Supreme Court allowed error to be cured by remittitur).

[36]Atlantic C. L. R. R. v. Webb, 112 Fla. 449, 150 So. 741 (1933).

IV. Damages

Once the liability of the railroad has been established, then under the Florida Comparative Negligence Statute, if the jury finds contributory negligence on the part of the plaintiff, it must apportion the damages according to the provisions of the statute.[37] These are determined by subtracting from the total damages suffered by the plaintiff an amount constituting that proportion of the total damage which the negligence attributable to the plaintiff bears to the total negligence, that is, the combined negligence of the plaintiff and the defendant. In other words, if the jury finds that the negligence of the defendant is three times as great as that of the plaintiff, the plaintiff's negligence is one fourth of the combined negligence of himself and the defendant, and his recovery will accordingly be reduced by one fourth.[38] The injured party may still recover, despite the fact that his negligence is greater than that of the railroad.[39] If contributory negligence by the plaintiff is present, the jury is under a duty to diminish the damages. When it is incontestable that both parties are at fault, and from the amount of the verdict it is evident that damages have not been diminished, the judgment will be reversed.[40]

V. Denial of Equal Protection

A serious question arises under the Comparative Negligence Statute by reason of the changes in conditions since its passage. The common-law rule of contributory negligence still bars recovery by a negligent railroad as plaintiff in an accident case, whereas other common carriers engaged in a similar business are permitted to use the statute to their advantage, despite their negligence, in an action against a railroad. In *Atlantic Coast Line R. R. v. Ivey*[41] the Florida Supreme Court, in striking down

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[37]Seaboard A. L. Ry. v. Callan, 73 Fla. 688, 74 So. 799 (1917).

[38]Illinois Cent. R. R. v. Skaggs, 240 U. S. 66 (1916); Seaboard A. L. Ry. v. Tilghman, 237 U. S. 499 (1915).

[39]Florida C. & P. R. R. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899).

[40]Florida E. C. Ry. v. Townsend, 104 Fla. 362, 140 So. 196 (1932); Florida E. C. Ry. v. Meacham, 77 Fla. 701, 82 So. 232 (1919); Atlantic C. L. R. R. v. Weir, 63 Fla. 69, 58 So. 641 (1912).

[41]148 Fla. 680, 5 So.2d 244 (1941). The Court added that practically all cattle in Florida roamed at large in 1889, whereas in 1941 only 30% did so. The *Ivey* case was limited to its facts in concurring opinion of Thomas, C. J., in McRae v.

as a denial of equal protection the Florida laws requiring a railroad to fence its right of way, emphasize the changes in travel conditions since the passage of the statute in 1899.[42] It stated that common carriers other than railroads owe like duties to the public and are equally charged with the protection of life and property while in pursuit of their business, yet they are not compelled to fence their lanes of travel.

In basing its decision in large measure on the advent and growth of motor carriers as a competing agency of transportation, the Court was merely recognizing the well-established rule that a statute valid when enacted may become invalid through changed conditions.[43] In *Loftin v. Crowley*,[44] however, involving damages resulting from collision between a truck and trailer and defendant railroad, occasioned by the negligence of both parties, the Court held, while discreetly avoiding expression of any reason therefor, that the Comparative Negligence Statute was based upon a reasonable classification and that the Legislature is empowered to classify along reasonable lines.[45] This decision expressly did not determine the question of the effect of the Comparative Negligence Statute when the railroad is the plaintiff in an action against another common carrier.

VI. Conclusion

It has not been the purpose of this note to consider within its scope the possibility of applying the doctrine of comparative negligence to all actions, as has been done in some jurisdictions and in the admiralty courts. Since, however, automobiles have been declared dangerous instrumentalities in this jurisdiction by court decision,[46] and since the dangerous nature of railroad operation has long been a dominant factor

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Atlanta & St. Andrews Bay Ry., 156 Fla. 200, 23 So.2d 76 (1945). *Contra:* Ft. Worth Ry. v. Welch, 147 Tex. Cr. R. 634, 183 S. W.2d 730 (1944).

[42]Fla. Comp. Gen. Laws §6669 (1927).

[43]Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 (1935); Kansas City Sou. Ry. v. Anderson, 233 U. S. 325 (1914); Poindexter v. Greenhow, 114 U. S. 270 (1884).

[44]150 Fla. 836, 8 So.2d 909 (1942). The decision itself goes no further than to apply the Comparative Negligence Statute to a defendant railroad, and to refuse to declare it unconstitutional merely because motor carriers are not made liable under similar circumstances.

[45]Atlantic C. L. R. R. v. Ford, 287 U. S. 502 (1933).

[46]Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

in sustaining the statutes under discussion, it could logically be argued that in these times the guaranty of equal protection of the laws governing common carriers is being denied in the case of the railroads. At the date of passage of the present Comparative Negligence Statute there was no comparable danger to persons or property from any common carriers on land other than railroads. It is noteworthy that the other great common carrier of older days, the ship, was already subject to the comparative negligence doctrine, which was developed in admiralty. Since then the conditions have changed radically. The basis for comparative negligence remains the same, but other instrumentalities of public transportation have entered the class in fact. The number of motor carriers of both passenger and freight traveling the roads and highways has increased to such an extent that the danger from their operation is abundantly clear and requires corresponding remedial legislation if that which now applies solely to railroads is still to be regarded as reasonable. "The constitutional right of equal protection of the laws means that everyone is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon others in like situations."[47] A statute intended to remedy unjust situations is today causing an injustice; and as a result it is open to serious criticism for failure to include the other common carriers along with railroads in protecting the public.

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[47]Caldwell v. Mann, 157 Fla. 633, 26 So.2d 788 (1946).